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ADVERSE POSSESSION AGAINST A RAILROAD RIGHT OF WAY.—*Southern Pacific Railway Company* v. *Hyatt et al.*, 132 Cal. 240 (March 16, 1901). The defendant Hyatt had occupied for over five years before this action was brought, a portion of the right of way, granted to the Central Pacific Railway Company, the predecessors of the plaintiff, by Act of Congress of July 1, 1862. Hyatt was in open, exclusive and notorious possession and occupancy of the property in question, for the period prescribed by the Statute of Limitations, and had paid the taxes thereon as the plaintiff had also done. It was held below as a conclusion of law, from the facts found, that the plaintiff fails in this action of ejectment, and is not entitled to recover possession of the premises.

It was held on appeal, reversing the court below, and refusing a rehearing, that the plaintiff was entitled to recover possession of the premises in question. The court holds that the point for decision here is, "whether the use of the property taken for the

purposes of a railroad is a public use within the meaning of the Constitution, or not." The court goes on to say that railroads are of such a public nature that no rights can be acquired against them by prescription. "Railroads are esteemed as public highways, constructed for the advantage of the public." *Southern Pacific Railway Company* v. *Burr,* 86 Cal. 279, 1890. In this case a railroad is termed a "qualified highway." It is stated that "here there was a special grant of right of way of 200 feet in width on each side of the road. This grant is conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant." An opposite view is taken in the late case of *Northern Pacific Railway Company* v. *Ely et al.* (Washington Supreme Court, June, 1901), 54 L. R. A. 526, where it is held on very similar facts, that the "court has not attempted to determine how much of the right of way was necessary for the railroad company to use in operating its road, but it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way according to its own determination, it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made." It would seem that the railroad officials are or should be more competent to judge how much land they need in order to properly operate their road, than legislators, who probably have little or no knowledge of the necessities of a railroad. If such officials allow another person to occupy adversely, and use a portion of their land for a long period of time without interruption, then their very negligence shows that they did not need the land, and that they thought it of very little value or consequence. This is not like the case of adverse possession, where the true owner lives hundreds of miles distant from his property, and very probably has not the slightest idea that some other person is in possession of his property, where some excuse might be made, though it would be a poor one, for here the road was in active operation and every official of the company from the section boss up, could and must have known that the defendant was wrongfully and adversely using the property of the railroad company.

The second and really determining reason laid down by the California court as to why the statute did not run against the railroad is, that a railroad is a public highway. This contention is strongly supported by similar decisions in many other jurisdictions. The leading case upholding this view seems to be that of *Olcott* v. *Fond du Lac County Supervisors,* 16 Wall. 678, 1872, where Mr. Justice Strong in his opinion says, "that railroads, though constructed by private corporations and owned by

them, are public highways . . . Very early the question arose whether a state's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such purpose, by such an agency, is taking land for public use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for the public use? And the reason why the use has always been held a public use, is that such a road is a highway, whether made by the public itself or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant. . . . It is said the railroads are not public highways *per se;* that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of the courts to make them such. True, they must be used in their peculiar manner, and under restrictions, but they are facilities for passage and transportation afforded to the public, of which the public has a right to avail itself. As well it might be said that a turnpike is a highway, only because declared such by judicial decision. A railroad built by a state no one claims would be anything else but a public highway, justifying taxation for its construction and maintenance, though it could be no more open to the public use than is a road built and owned by a corporation; yet it is the purposes and uses of a work which determine its character." See in accord, *Moran* v. *Ross,* 79 Cal. 159, 1889; *St. Joseph & D. C. Co.* v. *Baldwine,* 103 U. S. 426, 1880; *Drouin* v. *Boston & M. Ry. Co.,* 52 Atlan. 957 Vt., 1902; *R. R. Co.* v. *Obert.* 109 Pa. 193, 1885; *Penn. R. R. Co.* v. *Freeport,* 138 Pa. 91, 1890; *Bassett* v. *Penn. Co.,* 201 Pa. 226, 1902. In Pennsylvania a railroad is termed a qualified highway, against which the statute does not run.

There is, however, a long line of decisions which hold that railroads are not public highways, and that the statute will run against them. In *Northern Pacific Ry. Co.* v. *Ely* (*supra*), it is held that "a railway company owes certain duties to the public; but holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defence to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officials are not governmental agents whose laches creates no bar. . . . The state confers the right of eminent domain to enable railway companies

to efficiently perform their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railroad stocks and securities from sustaining loss through the negligence of their agents." Citing in accord, *Illinois C. Ry. Co.* v. *Houghton,* 126 Ill. 233, 1888; *Illinois C. Ry. Co.* v. *O'Connor,* 154 Ill. 550, 1895; *Illinois C. Ry. Co.* v. *Moore,* 160 Ill., 1896; *Donahue* v. *Illinois C. Ry. Co.,* 165 Ill. 640, 1897; *Illinois C. Ry. Co.* v. *Wakefield,* 173 Ill. 564, 1898; *Paxton* v. *Yazoo & M. V. Ry. Co.,* 76 Miss. 536, 1899; *Mathews* v. *Lake Shore & M. S. Ry. Co.,* 110 Mich. 170, 1896. See also in accord, *Coleman* v. *F. & P. M. Ry. Co.,* 64 Mich. 161, 1887; *Pittsb., Cinc., Chic. & St. Louis Ry. Co.* v. *Stickley,* 155 Ind. 312, 1900; *Wilbur* v. *Cedar Rapids & M. Ry. Co.,* 89 N. W. R. 101, Iowa, 1902; *Norton* v. *London & N. W. Ry. Co.,* L. R. 13 Ch. Div. 268, 1879 (which holds that the statute runs against the superfluous land of a railroad company); *Bobbett* v. *S. E. Ry. Co.,* L. R. 9 Q. B. Div. 424, 1882 (where it is held that it runs against the railroad company whether the land in question is superfluous or not); *Erie & N. W. Ry. Co.* v. *Rousseau,* 17 Ont. App. Rept. 483, 1902; *Northern Pacific Ry. Co.* v. *Hasse,* 68 Pac. Rept. 882, Wash., 1902, affirming *Ry. Co.* v. *Ely* (*supra*),

The California court, quoting *Jones on Easements,* § 281, lays down this further reason why the statute does not run: "The prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of ownership to the entire width of its right of way. The presence of one track constantly in use, is a definite badge of ownership, and the only practical assertion of title that can be made. If the public have used paths by the side of a railroad track for any length of time, the use must be considered permissive and not adverse." In accord, *Sapp* v. *Northern Cent. Ry. Co.* (*supra*); *Penn.* v. *Freeport* (*supra*). But see *contra Baldwine* v. *Boston & M. Ry. Co.,* 63 N. E. R. 427 Mass. 1902; *Ill. C. Ry. Co.* v. *O'Connor* (*supra*). The rule laid down by Mr. Jones would seem to say that the more open, hostile and adverse the user, the less title can be gained thereby. It certainly is impossible to serve more notice upon the owner of the property than that which his senses daily convince him exists. For a path along a railroad track is in open defiance of a well-known title and under the eyes of the owners or their agents. If the railroad can prosecute for trespass, and it is admitted that it can, why should it not make use of its rights and protect its property just the same as a private citizen or other corporation?

Counsel for the plaintiff in *Ry. Co.* v. *Ely* (*supra*) urged strongly upon the court that a railroad had no right to abandon all or any portion of its right of way; citing *Northern Pacific Ry.*

Co. v. *Smith,* 171 U. S. 260, 1897; *East Alabama Ry. Co.* v. *Doe ex dem. Visschar.,* 114 U. S. 340, 1885; *Thomas* v. *West Jersey Ry. Co.,* 101 U. S. 71, 1879; such act being *ultra vires.* But a close examination of these cases will show that they do not bear out the contention of counsel. True it is that these cases decide that a railroad cannot abandon or alienate all the right of way, and thus incapacitate itself for carrying out the intention for which it was granted a charter, but they do not decide that a railroad may not abandon such portion of its right of way as it does not need. This certainly is one of the strongest reasons why the statute should be held not to run. But this argument is restricted to those charters which do not give railroads a right to lease or sell their property or even mortgage it, and would not apply to most of the present day railroad charters, which give those rights.

W. F. N.